SINTRANS ASIA SERVICES PTE LTD v. INAI KIARA SDN BHD

COURT OF APPEAL, PUTRAJAYA
ABDUL AZIZ ABDUL RAHIM JCA
ROHANA YUSUF JCA
PRASAD SANDOSHAM ABRAHAM JCA
[CIVIL APPEAL NO: W-02(NCC)(A)-1539-09-2014]
22 MARCH 2016

ARBITRATION: *Award – Foreign arbitration award – Registration and enforcement – Whether parties intended to be bound by arbitration clause – Whether validity of arbitration agreement should be determined by law of country where award was made – Whether court should recognise and enforce foreign arbitration award – Arbitration Act 2005, ss. 39(1)(a)(ii), (v), 39(10)(b)(i) & (ii)*

By a charter hire agreement ('the agreement') made between the appellant ('the plaintiff') who was the disponent owner of a dredger ('vessel') and the respondent ('the defendant') as the charterer, the defendant had agreed to hire the vessel from the plaintiff for a period of three months with an option to extend for another three months. On the 23 February 2013, the vessel was delivered by the plaintiff to the defendant. On 30 May 2013, the defendant re-delivered the vessel to the plaintiff having extended the agreement for eight days. In breach of the terms of the agreement, the defendant failed to make payment for the sum of US$1,921,424.05 to the plaintiff. Therefore, the plaintiff sent a notice of arbitration to the defendant. The arbitration proceedings was held in Singapore. On 7 March 2014, the tribunal, *inter alia*, awarded the sum claimed by the plaintiff against the defendant and costs ('award'). The defendant failed to make payment of the sum stated in the award. Therefore, the plaintiff filed an originating summons ('OS') to register the award and for its enforcement. The defendant, on the other hand, argued that the plaintiff had commenced proceedings in the Admiralty Court in Kuala Lumpur and pleadings had been closed. In the circumstance, the defendant, argued that (i) the parties no longer intended to be bound by the arbitration clause; (ii) the arbitration clause did not apply and conferred no jurisdiction on the arbitrator; and (iii) the court should refuse recognition of enforcement. The High Court dismissed the OS filed by the appellant. Hence, the present appeal. The issue that arose for determination was whether the defendant had made out an argument for non-registration of the said award under ss. 39(1)(a)(ii) and (v) and 39(10)(b)(i) and (ii) of the Arbitration Act 2005.

Held (allowing appeal with costs)
Per Prasad Sandosham Abraham JCA delivering the judgment of the court:

(1) The arbitration clause in the agreement *ie,* cl. 22 clearly provided that the arbitration shall be conducted in accordance with Singapore law and the curial law in respect of the arbitration would also be Singapore law.

Since the defendant had failed to raise this issue in the courts in Singapore as the agreement provided, it was too late for the defendant to raise the matter at the stage of enforcement. (para 12)

(2) The defendant's argument about the admiralty proceedings was a non-starter as the amended consent order made in those proceedings which would clearly show the disputes would have to proceed with arbitration. (para 14)

(3) The validity of the arbitration agreement was to be determined by the law of the country where the award was made. Since the seat of the arbitration was in Singapore, the anchor or juridical home by which the arbitration clause was to be assumed was the laws applicable in the Republic of Singapore. The arbitration clause was clear in terms and parties had subjected themselves to be bound by it. Upon a careful examination of s. 39(1)(a)(ii) and since the arbitration agreement clearly provided for the law applicable to the arbitration agreement, the judge erred in law in subjecting the same to Malaysian law. (para 15)

(4) The court in Malaysia is purely an enforcement court and must recognise a valid arbitration award. If the defendant argued that the arbitration clause was not valid then they would have to establish that under the Singapore law. The matter would have to be dealt with by the courts having supervisory jurisdiction at the seat of arbitration *ie,* the Singapore courts or in the arbitration proceeding itself. (para 16)

Bahasa Malaysia *Headnotes*

Melalui satu perjanjian penyewaan ('perjanjian') yang dimeterai antara perayu ('plaintif') yang merupakan pemilik sebuah penggali ('jentera') dan responden ('defendan') sebagai penyewa, defendan bersetuju untuk menyewa jentera daripada plaintif untuk tempoh tiga bulan dengan pilihan untuk melanjutkan tempoh selama tiga bulan. Pada 23 Februari 2013, plaintiff menyerahkan jentera tersebut kepada defendan. Pada 30 Mei 2013, defendan menghantar semula jentera tersebut kepada plaintif setelah melanjutkan perjanjian selama lapan hari. Dalam pelanggaran syarat-syarat perjanjian, defendan gagal membuat bayaran bagi jumlah sebanyak US$1,921,424.05 kepada plaintif. Oleh itu, plaintif menghantar notis timbang tara kepada defendan. Prosiding timbang tara diadakan di Singapura. Pada 7 Mac 2014, tribunal, antara lain, mengawardkan jumlah yang dituntut oleh plaintif terhadap defendan dan kos ('award'). Defendan gagal membuat pembayaran jumlah wang yang dinyatakan dalam award tersebut. Oleh itu, plaintif memfailkan saman pemula ('OS') untuk mendaftarkan award tersebut dan untuk penguatkuasaannya. Defendan, sebaliknya, menghujahkan bahawa plaintif telah memulakan prosiding di Mahkamah Admiralti di Kuala Lumpur dan pliding telah pun ditutup. Dalam keadaan demikian, defendan menghujahkan bahawa (i) pihak-pihak tidak lagi berniat untuk terikat dengan klausa timbang tara; (ii) klausa timbang tara tersebut tidak terpakai dan tidak

memberikan bidang kuasa kepada penimbang tara; dan (iii) mahkamah harus menafikan pengiktirafan penguatkuasaan. Mahkamah Tinggi menolak OS yang difailkan oleh perayu. Oleh itu, rayuan ini. Isu yang dibangkitkan untuk pertimbangan adalah sama ada defendan berjaya dalam hujahannya supaya award tersebut tidak didaftarkan di bawah ss. 39(1)(a)(ii) dan (v) dan 39(10)(b)(i) dan (ii) Akta Timbang Tara 2005.

Diputuskan (membenarkan rayuan dengan kos)
Oleh Prasad Sandosham Abraham HMR menyampaikan penghakiman mahkamah:

(1) Klausa timbang tara dalam perjanjian iaitu kl. 22 dengan jelas menyatakan bahawa timbang tara harus dijalankan mengikut undang-undang Singapura dan undang-undang pemulihan bagi timbang tara juga adalah berdasarkan undang-undang Singapura. Oleh kerana defendan gagal membangkitkan isu ini di mahkamah Singapura seperti yang dinyatakan dalam perjanjian, adalah terlambat untuk defendan membangkitkan isu ini di peringkat penguatkuasaan.

(2) Hujahan defendan mengenai prosiding admiralti harus gagal kerana perintah persetujuan terpinda yang dibuat dalam prosiding tersebut yang jelas menunjukkan bahawa pertikaian harus diselesaikan melalui timbang tara.

(3) Keesahan perjanjian timbang tara harus ditentukan oleh undang-undang negara di mana award tersebut dibuat. Oleh kerana timbang tara bersidang di Singapura, 'anchor' atau 'juridical home' yang mana klausa timbang tara boleh dianggap adalah undang-undang Republik Singapura. Klausa timbang tara jelas dalam termanya dan pihak-pihak terikat olehnya. Selepas penilaian teliti s. 39(1)(a)(ii) dan oleh kerana perjanjian timbang tara dengan jelas memperuntukkan undang-undang yang terpakai kepada perjanjian timbang tara, hakim terkhilaf dari segi undang-undang dalam menaklukkan yang sama dengan undang-undang Malaysia.

(4) Mahkamah di Malaysia adalah mahkamah penguatkuasaan semata-mata dan harus mengiktiraf award timbang tara yang sah. Jika defendan menghujahkan bahawa klausa timbang tara tersebut tidak sah, maka defendan harus membuktikannya di bawah undang-undang Singapura. Perkara tersebut perlu diuruskan oleh mahkamah yang mempunyai bidang kuasa penyeliaan di tempat timbang tara iaitu mahkamah Singapura atau dalam prosiding timbang tara.

Case(s) referred to:
Dubai Islamic Bank PJSC v. Paymentech Merchant Services Inc [2001] CLC 173 ***(refd)***
Lombard Commodities Ltd v. Alami Vegetable Oil Products Sdn Bhd [2010] 1 CLJ 137 FC ***(refd)***
The Government of India v. Cairn Energy India Pty Ltd & Anor [2012] 3 CLJ 423 FC ***(refd)***

Legislation referred to:
Arbitration Act 2005, ss. 22, 39(1)(a)(ii), (v), (b)(i), (ii)

Other source(s) referred to:
Russel on Arbitration (2003), p 185, paras 5-91

For the appellant - Mohan Das Nair (Rahayu Abd Ghani & Ang Lay Ling with him); M/s Rahayu Partnership
For the respondent - R Thayalan; M/s R Thayalan

[Editor's note: For the High Court judgment, please see Sintrans Asia Services Pte Ltd v. Inai Kiara Sdn Bhd [2014] 1 LNS 1639 (overruled).]

Reported by Sandra Gabriel

JUDGMENT

Prasad Sandosham Abraham JCA:

[1] We heard this appeal on 23 April 2015 and allowed the same with costs. This was an appeal against the order of the High Court dated 29 August 2014, dismissing the originating summons dated 13 June 2014, filed by the appellant to register an Arbitration Award dated 7 March 2014, for enforcement and the costs award dated 12 May 2014, hereinafter referred to as the said award for costs. We append below our grounds for so doing. We shall refer to the parties as they were described in the High Court ie, the appellant plaintiff and the respondent defendant.

Background Facts

[2] By a charter hire agreement dated 15 February 2013 (the charter party) made between the plaintiff who is the disponent owner of the dredger "Gibraltar" (the vessel) and the defendant as the charterer, the defendant had agreed to hire the vessel from the plaintiff.

[3] The plaintiff had agreed to hire out the vessel to the defendant under the charter party for a period of three months with an option to extend for another three months subject to parties agreeing on the terms of the extension including hire.

[4] On 23 February 2013, the vessel was delivered by the plaintiff to the defendant at Bintulu Sarawak. On 30 May 2013, the defendant redelivered the vessel to the plaintiff having extended the charter party for eight days from 23 May 2013 to 30 May 2013.

[5] In breach of the terms of the charter party, the defendant has failed to make payment for the sum of US$1,921,424.05 to the plaintiff.

[6] On 12 September 2013, the plaintiff sent a notice of arbitration to the defendant and appointed Professor Neale R Gregson a chartered Arbitrator of the Arbitration Charters Singapore as its nominated Arbitrator. As the defendant did not appoint a second Arbitrator, the said Professor was appointed the sole Arbitrator.

[7] The defendant did not participate in the arbitration proceedings. On 7 March 2014, the tribunal awarded the plaintiff the sum claimed by the plaintiff against the defendant. The tribunal also published the costs award dated 12 May 2014 and the addendum to the costs award dated 19 May 2014.

[8] The defendant did not make payment of the sum stated in the said award, hence the filing of the plaintiff's application.

[9] We are of the view that, the only issue for this court to consider is whether the defendant had made out an argument for non-registration of the said award under s. 39(1)(a)(ii) and (v) and s. 39(1)(b)(i) and (ii) of the Arbitration Act 2005. Reference is also drawn to the relevant provisions of the Reciprocal Enforcement of Judgments Act 1958.

[10] The defendant argued the plaintiff had commenced proceedings in the Admiralty Court in Kuala Lumpur and pleadings had been closed. It followed therefore, that parties no longer intended to be bound by the arbitration clause and the same did not apply and conferred no jurisdiction on the Arbitrator and the court should refuse recognition for purposes of enforcement.

[11] To address this issue, we have to first look at the arbitration clause in the charter party ie, cl. 22 (see rekod rayuan jilid 2 bahagian B&C p. 108) which we set out below:

> *This Contract shall be governed by and construed in accordance with Singapore law. Any dispute arising out of or in connection with this Contract, including any question regarding its existence, validity or termination shall be referred to and finally resolved by arbitration in Singapore in accordance with the Singapore International Arbitration Act (Chapter 143A) and any statutory modification or re-enactment thereof save to the extent necessary to give effect to the provisions of this Clause.*
>
> The arbitration shall be conducted in accordance with the Arbitration Rules of the Singapore Chamber of Maritime Arbitration (SCMA) current at the time when the arbitration proceedings are commenced.
>
> The reference to arbitration of disputes under this clause shall be to three arbitrators. A party wishing to refer a dispute to arbitration shall appoint its arbitrator and send notice of such appointment in writing to the other party requiring the other party to appoint its own arbitrator and give notice that it has done so within fourteen (14) calendar days of that notice and stating that it will appoint its own arbitrator as sole arbitrator unless the other party appoints its own arbitrator and gives notice that it has done so within the fourteen (14) days specified. If the other party does not appoint on arbitrator and does not give notice that it has done so within the fourteen (14) days specified, the party referring a dispute to arbitration may, without the requirement of any further prior notice to the other party, appoint its arbitrator as sole arbitrator and shall advise the other party accordingly. The award of a sole arbitrator shall be binding on both parties as if he had been appointed by agreement.

A Nothing herein shall prevent the parties agreeing in writing to vary these provisions to provide for the appointment of a sole arbitrator.

In cases where neither the claim nor any counterclaim exceeds the sum of USD 50,000 (or such other sum as the parties may agree) the arbitration shall be conducted before a single arbitrator in accordance with the SCMA B Small Claims Procedure current at the time when the arbitration proceedings are commenced. (emphasis added)

[12] Clause 22 clearly provides that the arbitration shall be conducted in accordance with Singapore law and the curial law in respect of the arbitration would also be Singapore law. Since the defendant had failed to raise this issue C in the courts in Singapore as the charter party provides, in our view it is too late in the day for the defendant to raise the matter at the stage of enforcement. In the Federal Court's decision in *Lombard Commodities Ltd v. Alami Vegetable Oil Products Sdn Bhd* [2010] 1 CLJ 137; [2010] 2 MLJ 23 where we refer to the judgment of His Lordship Arifin Zakaria CJ (Malaya) D (as he then was) at pp. 151 to 152 (CLJ) of the judgment, and we quote:

[42] The next issue raised by the respondent is that the respondent was never a party to the arbitration agreement. In this regard I agree with the submission for the appellant that if that is so, it is for the respondent to apply to the English Court, being the court having supervisory jurisdiction, to have the award set aside instead of raising the issue before our court, E which is merely an enforcement court.

[43] **As observed by Coleman J in *A v. B* [2007] 1 Lloyd's Report 358:**

... an agreement as to the seat of an arbitration is analogous to an exclusive jurisdiction clause. Any claim for a remedy going to the existence or scope of the arbitrator's jurisdiction or as to the validity of an existing interim or F *final award is agreed to be made only in the courts of the place designated as the seat of the arbitration.*

[44] In *Sabah Gas Industries Sdn Bhd v. Trans Samudera Lines (S) Sdn Bhd* [1993] 3 CLJ 532, it was similarly held that a party who had been given every opportunity to submit and to take part in arbitration proceedings in G London ought to have challenged the conduct of the arbitrator and/or validity of the award in the English Courts and not here. Similarly in *Hebei Import & Export Corporation v. Polytech Engineering Company Limited* FAC V No 10 of 1988 (Hong Kong), the Court of Final Appeal of Hong Kong held that a party may be precluded by his failure to raise a point before the court of supervisory jurisdiction from raising that point or issue before H the court of enforcement.

(emphasis added)

[13] The Arbitration Act 2005 in particular s. 22 defines the seat of arbitration. We would hold that seat of arbitration is the juridical seat of the I arbitration and it is independent of the venue where hearings or other parts of the arbitral process occurred. The seat prescribed the procedural law of

the arbitration (see *Russel on Arbitration* (2003), p. 185, para. 5-091). We also refer to the judgment of Alkens J in *Dubai Islamic Bank PJSC v. Paymentech Merchant Services Inc* [2001] CLC 173 where His Lordship held and we quote:

> Although English courts were familiar with the concept of the 'seat' of an arbitration before the 1996 Act was passed (see, e.g. the *Peru* case [1988] 1 Ll Rep 116; *Union of India v. McDonnell Douglas Corp* [1993] 2 Ll Rep 48; *Sumitomo Heavy Industries v. Oil & Natural Gas Commission* [1994] 1 Ll Rep 45) the use of the concept in an English statute concerning arbitration is new. It is clear from s. 2(1) of the Act that the concept is used in order to define which arbitrations will be subject to the statutory regime in Pt. I of the 1996 Act. (There are some refinements to this, which are unnecessary to consider for present purposes.) Part I of the Act gives the English court important powers in relation to arbitration proceedings which will be exercisable at different stages of an arbitration. Therefore, in general, only those arbitrations that have their 'seat' in England and Wales should be subject to the exercise of the court's powers in Pt. I of the Act. The Act uses the concept of the 'seat' as the test for the exercise of Pt. I powers rather than the choice of procedural law made by the parties in their arbitration agreement. This seems clear from the wording of s. 4(4) and (5) of the Act. Section 4(1) and (2) stipulate that there will be 'mandatory' and 'non-mandatory' provisions in Pt. I . The Pt. I regime applies 'whether or not the law applicable to the parties' agreement is the law of England and Wales or, as the case may be, Northern Ireland' (s. 4(4) of the Act). But if the parties have chosen another procedural law for the arbitration or particular aspects of it, then, in relation to non-mandatory provisions in Pt. I , the effect will be as if the parties had made a specific agreement dealing with those matters (s. 4(5) of the Act).

Close to home, we refer to the Federal Court's decision in *The Government of India v. Cairn Energy India Pty Ltd & Anor* [2012] 3 CLJ 423 to the judgment of Richard Malanjum CJ (Sabah & Sarawak), at pp. 439-440 of the judgment and we quote:

> [22] Thus, the appellant submits that English law applies for the setting aside of the award since the curial law of the seat of arbitration had lapsed upon the grant of the award. The respondents reject this approach and argue that the curial law effectively remains to be Malaysian law for the setting aside of the award.
>
> [23] We are inclined to agree with the contention of the respondents. Our courts had in a prior occasion taken the view that the seat of the arbitration is the place where challenges to an award are made. In *Lombard Commodities Ltd v. Alami Vegetable Oil Products Sdn Bhd* [2010] 1 CLJ 137, this court referred to the English case of *A v. B* [2007] 1 Lloyd's LR 237 which decided that challenges are to be made at the courts of the seat of arbitration. Thus, for now we find no reason to depart from the current position of the law.

A [24] Indeed in *C v. D* [2007] EWCA Civ 1282; [2007] All ER (D) 61 Longmore LJ at para. 17 said this:

It follows from this that a choice of seat for the arbitration must be a choice of forum for remedies seeking to attack the award. As the judge said in para. 27 of his judgment, as a matter of construction of the
B insurance contract with its reference to the English statutory law of arbitration, the parties incorporated the framework of the 1996 Act. He added that their agreement on the seat and the "curial law" necessarily meant that any challenges to any award had to be only those permitted by that Act. In so holding he was following the decisions of Colman J in *A v. B* 2006] EWHC 2006 (Comm), [2007] 1 All ER (Comm) 591, [2007]
C 1 Lloyd's Rep 237 and *A v. B (No 2)* [2007] EWHC 54 (Comm), [2007] 1 All ER (Comm) 633, [2007] 1 Lloyd's Rep 358 in the first of which that learned judge said (para. 111):

... an agreement as to the seat of an arbitration is analogous to an exclusive jurisdiction clause. Any claim for a remedy going to the
D existence or scope of the arbitrator's jurisdiction or as to the validity of an existing interim or final award is agreed to be made only in the courts of the place designated as the seat of the arbitration.

That is, in my view, a correct statement of the law... (emphasis added).

[25] *It is therefore clear that the English Court of Appeal clearly sets out that the*
E *curial law ought to be that of the seat of arbitration. As stated above, our courts have adopted a similar position. Thus, in this case as Kuala Lumpur was selected as the juridical seat of arbitration, the curial law is the laws of Malaysia and we so hold. And we would add that it is vital for parties to follow the mandatory rules of the seat of arbitration since the application of such mandatory procedural rules (curial law) of the seat will remain subject to the jurisdiction and control of the courts of the*
F *seat of the arbitration including when considering applications to set aside awards. We are therefore not persuaded that the decisions of the Indian Supreme Court should be applied*.

It follows therefore that in challenges of this nature, the proper avenue for the same to be ventilated would be in the courts of Singapore.

G **[14]** The defendant's argument about the admiralty proceedings really in our view is a non-starter as one only has to look at the amended consent order made in those proceedings which will clearly show the disputes would have to proceed with arbitration (rekod rayuan jilid 4, bahagian C pp. 245-248).

H **[15]** The validity of the arbitration agreement which we have referred to is to be determined by the law of the country where the award was made. In our particular case since the seat of the arbitration was in Singapore, the anchor or juridical home by which the arbitration clause is to be assumed is the laws applicable in Republic of Singapore. The arbitration clause is clear in terms and parties have subjected themselves to be bound by it. Upon a
I careful examination of s. 39(1)(a)(ii) and since the arbitration agreement clearly provides the law applicable to the arbitration agreement, the learned judge erred in law in subjecting the same to Malaysian law.

[16] The court in Malaysia is purely an enforcement court and must recognise a valid arbitration award save and except for the exception provided under the law. If the defendant in this case argues that the arbitration clause is not valid then they would have to establish that it is so under the Singapore law. And the matter would have to be dealt with by the courts having supervisory jurisdiction at the seat of arbitration ie, the Singapore courts or in the arbitration proceeding itself.

[17] For all the aforesaid reasons set out above, we allowed the appeal with costs.